A

LIN KAI WING & ANOR v. LIN KAI LAM & ORS

COURT OF APPEAL, PUTRAJAYA
ALIZATUL KHAIR OSMAN JCA
ABANG ISKANDAR JCA
NALLINI PATHMANATHAN JCA
B [CIVIL APPEAL NO: B-02(IM)(NCVC)-83-01-2015]
17 FEBRUARY 2016

LIMITATION: *Fraud – Discovery of fraud – Appeal against decision of High Court – Appellants withdrew monies from company's account – Misappropriation*
C *of funds amounting to RM5,121,781.95 from 1990 till 1999 – Allegation against – Whether appellants acted fraudulently, dishonestly and/or in breach of their fiduciary duties – Claim for damages – Whether action time barred – Whether withdrawals made bona fide – Whether evidence adduced to establish fraud –*
D *Whether testimony considered by trial court – Whether company's accounts accessible to respondents at all material times – Whether reasonable diligence used to discover fraud – Whether requirements under s. 29 Limitation Act 1953 satisfied*

The appellants and the respondents were family members and partners in Kong Ming Trading ('KMT'). As the business progressed, Kong Ming Trading Sdn Bhd ('KMTSB') was incorporated and the said company carried
E on the business of KMT. Another company known as L&W Concrete Sdn Bhd was also incorporated. The first appellant and the first respondent were both shareholders and directors of KMTSB. At all material times, the first appellant was the sole signatory of the company's accounts and conducted the company's business. The respondents, however, did not appear to play an
F active role in KMTSB's business. Until 15 October 2010, the first appellant and the first respondent were the directors of the company. The present shareholders of the company were the first respondent, the first appellant as well as the first respondent's daughter and the first appellant's son. The first appellant's son was then appointed as a director of KMTSB. Due to certain
G series of events, the first respondent and his daughter filed a suit in the High Court ('the oppression petition') pursuant to s. 181 of the Companies Act 1965. In the course of these proceedings, the respondents proceeded to review the accounts of KMT and KMTSB. Upon inspection, the respondents alleged that over the period from 1990 to 1999, the appellants had
H misappropriated the funds amounting to a sum of RM5,121,781.95 without their consent as partners to the said company. A consent order, however, was recorded and it was agreed that the first appellant and his son would purchase the shares of KMTSB and L&W Concrete Works Sdn Bhd at a reasonable price. Subsequently, the respondents filed an action against the appellants claiming that the latter had acted fraudulently, dishonestly and/or in breach
I of their fiduciary duties to the other partners in the company and sought for damages. The respondents relied solely on the fact that the appellants made

withdrawals from the company's accounts. The appellants, however, never disputed these withdrawals and asserted that they never concealed these withdrawals which were *bona fide* and represented either their share of the profits or to meet the legitimate business needs of the company. Further, it was argued that the respondents' claim was time barred. The judge, however, chose to accept the respondents' version and held, *inter alia,* that there was no evidence to support the appellants' contention that the respondents had full access to all the accounts of the company at all material times and the action was filed well within time. Hence, this appeal. Among the issues that arose for consideration were (i) whether the appellants committed fraud; and (ii) whether the respondents' claim was caught by limitation since the claim sought recovery of monies said to have been misappropriated from 1990 to 1999.

Held (allowing appeal with costs)
Per Nallini Pathmanathan JCA delivering the judgment of the court:

(1) The respondents relied on the facts of the undisputed withdrawals over the period from the year 1990 till 1999 to establish fraud. However, no *modus operandi* or particulars of fraud were set out in the statement of claim and no further evidence was adduced to establish fraud. All the withdrawals were fully recorded by a third party employee. This was not consonant with fraud which generally involves the concealment of the withdrawals. In the circumstances, the respondents failed to establish that the monies set out in the annexure to the statement of claim were misappropriated. The trial judge erred in equating a withdrawal of funds with misappropriation. The judge also failed to consider adequately or at all, the defence of the first appellant to the effect that there had been full disclosure of all the withdrawals. There was also failure to consider the first appellant's testimony that the monies were drawn either by way of profits due to the appellants or for the legitimate purposes of the business of KMT or KMTSB. (para 49)

(2) The onus to establish a cause of action in fraud, as well as fraudulent concealment within the context of s. 29 of the Limitation Act 1953 fell on the respondents. Simply pointing to withdrawals and testifying orally that they had no knowledge of the accounts was insufficient to establish fraud. This was particularly so when the surrounding contemporaneous evidence showed that disclosure could have been sought and obtained at any point of time. This was borne out by the fact that every single withdrawal was particularised and set out, which detracts from a scheme to defraud. (paras 51 & 54)

(3) As a private limited company, KMTSB was bound to have its accounts audited. The first respondent as a director was entitled as of right to full disclosure in respect of the accounts, if he had seen fit to demand such disclosure. However, this was not done till 2010. The requirement of

'reasonable diligence' is an essential element of s. 29 of the Limitation Act 1953. The learned judge failed to consider that s. 29 requires the person seeking to fall within its ambit and lengthen the period of limitation to establish that he could not, with reasonable diligence, have discovered this fact. However, it was evident here that the accounts were accessible to the respondents at all material times. The trial judge erred in that he failed to consider adequately or at all this contemporaneous and relevant evidence. If he had done so, he would have concluded that the respondents could have sought and procured access to the accounts of KMTSB or KMT long before 2010. (para 51)

(4) The fact that the respondents had possession of the accounts pursuant to the oppression petition as of 2010 and yet failed to lodge a police report alleging fraud or seeking recovery until some two years later suggested that the respondents' claim lacked legitimacy. Further, litigation in relation to matters involving the business of KMT or KMTSB ought to be litigated in one suit. Filing several suits gave rise to the possibility of duplicity in findings and not to mention, *res judicata.* The trial judge failed to appreciate that a plea of fraud was not simply made out by pointing to the undisputed fact of withdrawals from KMT or KMTSB. It requires considerably more to establish fraud. Even by applying the lower standard of a balance of probabilities, the plea of fraud was simply not made out. The factual matrix of the case also did not allow the respondents to rely on s. 29 of the Limitation Act 1953. (paras 52 & 53)

(5) The trial judge did not consider the *modus operandi* for the fraud or particulars of the same. Most fatally, the trial judge failed to give any reasonable consideration to the appellants' defence of full disclosure and acquiescence to those withdrawals. In the circumstances, the trial judge was plainly wrong in arriving at the conclusion that fraud had been established on the evidence. (para 54)

Case(s) referred to:

Anderson v. City of Bessemer (1985) 470 US 564 ***(refd)***
Carlyle v. Royal Bank of Scotland Plc [2015] UKSC 13 ***(refd)***
Clarke v. Edinburgh and District Tramways Co Ltd [1919] SC (HL) 35 ***(refd)***
Conlay Construction Sdn Bhd v. Perembun (M) Sdn Bhd [2013] 9 CLJ 828 FC ***(refd)***
Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd [2015] 2 CLJ 453 FC ***(refd)***
Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***
Henderson v. Foxworth Investments Limited [2014] UKSC 41 ***(refd)***
McGraddie v. McGraddie and Another [2013] UKSC 58 ***(refd)***
Merita Merchant Bank Singapore Ltd v. Dewan Bahasa dan Pustaka [2014] 9 CLJ 1064 FC ***(refd)***
Thomas v. Thomas [1947] AC 484 ***(refd)***
Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 1 LNS 119 FC ***(refd)***
Yuill v. Yuill [1945] P 15 ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 11
Companies Act 1965, s. 181
Limitation Act 1953, s. 29
Rules of the High Court 1980, O. 42 r. 12

For the appellant - Dhanaraj Vasudevan & Kalai Selvi M; M/s Kamil Hashim Raj & Lim
For the respondent - Colin Andrew Pereira; M/s Goh Wong Pereira

[Editor's note: Appeal from High Court, Shah Alam; Suit No: 22NCVC-709-06-2012 (overruled).]

Reported by Kumitha Abd Majid

JUDGMENT

Nallini Pathmanathan JCA:

Introduction

[1] This issue which arose for consideration in this appeal was whether Lin Kai Wing and Loke Ching Yim ('the appellants') had in fact misappropriated funds to the extent of RM5,121,781.95 from one Kong Ming Trading ('KMT'). KMT is an entity which commenced as a sole proprietorship established by Lin Kai Wing ('the first appellant') and which the first respondent, Lin Kai Lam ('the first respondent') subsequently joined as a partner. Later the other two respondents, Wong Sou Fuan and Leng Kai Yen ('the second respondent' and 'the third respondent' respectively) and the second appellant, Loke Ching Yim ('the second appellant') joined KMT as partners. In short, KMT became a partnership between the appellants and the respondents.

[2] The appellants and the respondents are all related. The first and second appellants are husband and wife. The first and second respondents are also husband and wife. The third respondent is the mother of the first appellant and the first respondent. The first appellant and the first respondent are brothers.

[3] The central issues for disposal were therefore whether a fraud on the 'partnership' comprising KMT had in fact been committed by the appellants, and whether the respondents' claim was caught by limitation as the claim sought recovery of monies said to have been misappropriated from the year 1990 to 1999.

In considering these issues, particularly that of whether a fraud was perpetrated, we were mindful of the fact that as the matter is raised on appeal, this court must bear in mind the limited power of an appellate court to reverse the findings of fact of the judge who had heard the evidence. An appellate court will generally defer to the findings of fact of the first instance

judge unless satisfied that the judge was plainly wrong. Interference with such findings only ensue/transpire when an error is clearly identifiable on the record, for example a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence. (see *Carlyle v. Royal Bank of Scotland Plc* [2015] UKSC 13).

[4] However, this was a case where we were satisfied that the trial judge had, with respect, erred in law in his interpretation of the provisions of the Limitation Act 1953 as applied to the factual matrix of this case. More pertinently, we were convinced that there was simply insufficient basis, *albeit* in law or in fact to substantiate the respondents' claim of a fraud being perpetrated on the 'partnership' over a period of nine years some twenty-three years ago.

[5] In this context, it was the respondents' claim that based on a perusal and examination of the accounts of Kong Ming over the period from the years 1990 to 1999, the sum of RM5,121,781.95 was misappropriated by the appellants. All monies taken out from the partnership are fully accounted for and recorded by a third party employee. In other words, these 'misappropriated' monies were fully disclosed as having been withdrawn for the appellants or the business of KMT during this period. The respondents relied solely on the fact of the existence of these withdrawals in the accounts, to establish that a fraud had been perpetrated on the remaining members of the 'partnership' comprising KMT. The fact of these withdrawals is not disputed. The appellants maintain that they never concealed these withdrawals which were *bona fide* withdrawals representing either their share of the profits or to meet the legitimate business needs of KMT.

[6] The trial judge at first instance chose to accept the respondents' version of a misappropriation of funds, premised almost entirely on the fact that the appellants did not dispute the withdrawals from the accounts of KMT. In short he did, with respect, virtually equate such admissions as to the withdrawal of funds, to misappropriation. He rejected the respondents' contention that there was never any active concealment of such withdrawals because the accounts were accessible to all parties at all times and there had been full acquiescence to the business being run that way until the brothers had a disagreement resulting in another suit, namely an oppression petition being filed, *inter alia,* by the first respondent against the first appellant.

[7] In so doing however, it is evident that the trial judge failed to evaluate or consider adequately or at all the evidence of the appellants. Instead, he simply concluded that the appellants had failed to prove that the withdrawals were for the legitimate needs of the business and by way of profits. He also failed, with respect, to consider that the respondents had failed to either plead any particulars, or adduce any evidence in support of their claim of fraud. By so doing, the trial judge effectively reversed the burden of proof.

[8] As a consequence, this court reversed the finding of the first instance court and dismissed the respondents' claim. We append below our full reasons for so doing.

Salient Background Facts

[9] The relationship between the parties has been explained above.

[10] On 23 November 1987, the first appellant established a sole proprietorship known as Kong Ming Trading. Subsequently on 25 April 1990 the first appellant agreed to his brother, the first respondent joining the business. The second and third respondents joined the business as partners on 1 January 1991.

[11] KMT was established as a business in the manufacturing and trading of bricks. As business progressed, the first appellant determined that it was best that a private limited company be formed to carry on the business, whereupon Kong Ming Trading Sdn Bhd ('KMTSB') was incorporated in or around 21 June 1996. From that date, KMTSB carried on the business of KMT.

[12] It is pertinent that this fact was not fully considered by either the learned trial judge or the parties. As KMTSB took over the business of KMT, it should follow that the sole proprietorship was subsumed by the company. It remains unclear whether this was the case or whether KMT and KMTSB remained as separate entities. In any event as KMTSB took over the business of KMT, it is unclear what KMT's role was after 1996.

[13] As the business progressed further, another company known as L & W Concrete Sdn Bhd was formed to carry out the manufacturing of bricks while KMTSB undertook the trading of these bricks.

[14] The first appellant and the first respondent (ie, the brothers) were both shareholders and directors in KMTSB. The first appellant held 51% of the shareholding while the first respondent held 49%. The first respondent was also a director of KMTSB.

[15] With respect to L & W Concrete Sdn Bhd, the first respondent held approximately 51% of the shareholding while the first appellant held approximately 49%. Both the first appellant and the first respondent are directors of L & W Concrete Sdn Bhd.

[16] The parties submitted and the learned trial judge accepted that there was a partnership subsisting between the parties. Given the incorporation of KMTSB, pursuant to which the business of KMT was taken over, it seems improbable that such a relationship could continue to subsist.

[17] At all material times, the first appellant was the sole signatory to the company's accounts and conducted the company's business. The respondents did not appear to play an active role in KMTSB's business.

[18] Until 15 October 2010, the first appellant and the first respondent were the directors of the company. The present shareholders of the company are the first respondent, the first appellant, as well as the first respondent's daughter and first appellant's son (Lin Cze Yi and Lin Kah Hong respectively). These four persons are also the directors and shareholders of L&W Concrete Works Sdn Bhd.

[19] The respondents pleaded that on 18 October 2010, the company secretary gave the first respondent a copy of the minutes of an Extraordinary General Meeting ('EGM') purportedly held on 15 October 2010, where Lin Kah Hong, the first appellant's son was appointed a director of KMTSB. The respondents say that they had no notice of this EGM.

[20] The respondents plead that on 20 October 2010, the company secretary sent Lin Cze Yi purported circular resolutions where the signatories of the company's bank accounts at Public Bank Berhad and Maybank Berhad were changed to allow the first appellant and his son, Lin Kah Hong to sign cheques without the concurrence of either the first respondent or his daughter, Lin Cze Yi.

[21] This change of signatories was also replicated in the case of L&W Concrete Works Sdn Bhd in a board of directors' meeting purportedly held on 15 October 2010. The respondents plead that they had no notice of the convening of this meeting.

[22] Due to this series of events, the first respondent and his daughter filed Kuala Lumpur High Court Petition No. D-26NCC-115-2010 ('the oppression petition') pursuant to s. 181 of the Companies Act 1965 against the first appellant, his son and both the companies, maintaining that they were guilty of oppression.

[23] In the course of these proceedings, the respondents proceeded to review the accounts of KMT and KMTSB. They alleged that upon such review they discovered that the appellants had misappropriated 'partnership' funds amounting to a total of RM5,121,781.95 without their consent as partners to the said company.

[24] A consent order was recorded in respect of the oppression petition on 7 June 2011. The main terms of that consent order were that Lin Kai Wing (the first appellant here) and Lin Kah Hong (the first appellant's son) would purchase the shares of Kong Ming Trading Sdn Bhd and L&W Concrete Works Sdn Bhd at a reasonable price to be valued as at the date of the consent order.

[25] Subsequently on 8 June 2012, the respondents filed an action contending that the appellants had acted fraudulently, dishonestly and/or in breach of their fiduciary duties to the other partners of the company. The respondents sought the following reliefs, *inter alia*:

(i) Damages in the sum of RM3,073,069.17 – this sum represents three-fifths of the amount misappropriated by the appellants;

(ii) Alternatively, damages to be assessed;

(iii) Interest at such rate the court deems fit on any judgment sum from 28 October 1999 until the date of judgment pursuant to s. 11 of the Civil Law Act ('CLA') 1956;

(iv) Interest at the rate of 4% p.a. on any judgment sum from the date of judgment until the date of full settlement pursuant to O. 42 r. 12 of the Rules of the High Court 1980 (now Rules of Court 2012);

(v) That all necessary accounts and inquiries be taken;

(vi) Liberty to apply;

(vii) Any further order deemed fit by the court.

The Decision Of The High Court

[26] The learned High Court Judge narrowed down the issues for trial to the following:

(a) Whether the action was barred by the Limitation Act 1953 (Revised 1981) [Act 254];

(b) Whether the respondents had *locus standi* to bring this action against the appellants;

(c) Whether the appellants had fraudulently misused the funds of Kong Ming Trading for their personal use; and

(d) Whether by misusing the said funds, the appellants breached the fiduciary duty owed by them to the respondents.

[27] The High Court allowed the respondents' claim with costs of RM20,000. The High Court concluded that the appellants owed the respondents a fiduciary duty. The court made a finding that the appellants had not disputed that monies were taken out from the company for the first appellant's personal use, and found that the appellants had done so without informing the respondents.

[28] The High Court went on to make the following findings:

(a) The respondents' claim was premised on acts of misappropriation starting from 1990, approximately 22 years before the date of filing of this action;

(b) Section 29 of the Limitation Act 1953 served the purpose of protecting a plaintiff who was ignorant of his right of action in a case of fraudulent concealment. It overcame the difficulty that time would otherwise be running against such a plaintiff, without his knowledge;

(c) It is trite law that fraudulent concealment need not involve active fraudulent concealment;

(d) It is sufficient if it is proven that the act of the appellants was so dishonest and unconscionable that it would be inequitable to allow them to rely on the limitation period. The act of the appellants in misusing the company's funds and not notifying the respondents had fulfilled this requirement;

(e) There was no evidence to support the appellants' contention that the respondents had full access to all the accounts at all material times. Neither was there evidence to support the contention that the respondents were in possession of most of the account books. In short the learned trial judge determined that the factual matrix of this case fell within the ambit envisaged by s. 29 of the Limitation Act 1953;

(f) The respondents' evidence that they only discovered the misappropriation in October 2010 was not challenged by the appellants during cross-examination;

(g) This action was filed well within time;

(h) There is no merit in the issue that no police report was lodged against the appellants and no notice of demand was served on the appellants;

(i) The issue of *locus standi* which was raised by the appellants is a legal issue. There is no legal restriction that prevents a partner from suing another partner in a partnership business;

(j) A partner owes a fiduciary duty to another partner. A partner is not allowed in law to gain private advantage at the expense of his partner or the said business;

(k) The respondents produced cheque butts in support of their claim that the appellants had been misusing the company funds;

(l) Throughout the whole trial, the appellants never disputed the fact that funds had been taken out for personal use;

(m) The appellants' contention that the said funds were their share of the profit was a mere allegation unsupported by any evidence.

The Appellants' Submissions

[29] In this court, learned counsel for the appellants submitted that this action was commenced with *mala fides*. He submitted that the respondents were dissatisfied with the outcome of the oppression petition, and hence instituted this action. In the oppression petition, a consent order was recorded wherein it was agreed that Lin Kai Wing (the first appellant here) and Lin Kah Hong (the first appellant's son) would purchase the shares of

Kong Ming Trading Sdn Bhd and L&W Concrete Works Sdn Bhd at a reasonable price to be valued as at the date of the consent order on 7 June 2011.

[30] The appellants' counsel submitted that if the respondents indeed discovered misappropriation by the appellants after the filing of that matter, this suit would have been filed in 2010 or 2011, not in 2012. It was submitted that this action is barred by the Limitation Act 1953. There was no question of fraudulent concealment because the respondents had access to the accounts at all material times.

[31] Further, the issue of *res judicata* was invoked because the current action is similar to the 2010 suit. It was further pointed out that the respondents filed another suit in the Shah Alam High Court, Civil Suit No. 22NCVC-35-04-2013 alleging that the appellants had purchased properties using the company's funds. In that suit, the respondents sought the sale of the said properties and an equal distribution of the proceeds. The appellants' counsel contended that the multiple suits were filed with the intention of hampering the first appellant in the running of the business that he had single-handedly built and developed.

[32] On the issue of misappropriation, it was submitted for the appellants that KMTSB was essentially run as a family business. The first respondent was aware at all material times of the day to day transactions of the company. The second appellant was never involved in the running of the company. Monies were withdrawn from the company with no concealment whatsoever. The withdrawals were fully recorded so the element of concealment is absent. The monies were withdrawn for the personal use of both the appellants and the respondents, as well as for the legitimate running of the business of KMTSB. The taking of funds by the appellants was simply their withdrawal of the profits due to them. This mode of withdrawal was accepted and condoned by the entire family, including the respondents who similarly withdrew monies directly to meet their liabilities too.

[33] Learned counsel for the appellant pointed out that the reason that the respondents' claim was so detailed was because the first appellant meticulously recorded all the transactions, but if he had truly misappropriated the monies he would not have kept the accounts in such pristine order. The respondents did not deny the fact of this recording of all withdrawals and expenditure.

[34] Further, it was pointed out that the first respondent had taken away most of the company's account books when he had initiated the 2010 suit.

[35] In summary, it was submitted that the company's accounts were accessible by the respondents with reasonable diligence. However, the respondents chose not to request for the company's accounts between the

years 1991 to 1999. As such fraudulent concealment, an essential element to be made out for the application of s. 29 of the Limitation Act 1953, was missing.

[36] It was submitted that on the factual matrix of this case, the respondents had failed to establish fraud on the part of the appellants. In this context, it was submitted that the respondents did not plead the particulars of fraud to explain the basis of their allegations. Only the list of monies withdrawn was pleaded and such withdrawals in themselves do not comprise particulars of fraud. The respondents gave no particulars of how the petty cash was used for personal purposes by the appellants. On the other hand, the appellants testified that the payments were monies due from the company for the first appellant's housing loan, his income tax and his insurance.

The Respondents' Submissions

[37] Learned counsel for the respondent submitted that the issues in this case are primarily factual in nature, the issue being whether the appellants had in fact misappropriated partnership funds. The respondents' counsel submitted that the learned judge made a finding of fact that the appellants had taken out partnership funds for the first appellant's personal use, and this had not been disclosed to the respondents. It was submitted that unless the appellants can show where the learned judge was plainly wrong, the High Court decision ought not to be reversed.

[38] It was further submitted that the first appellant was in a position to misuse his power as the sole signatory of the company's cheques especially since there was no statutory requirement for the accounts to be audited or disclosed. This point is perplexing because the evidence discloses that Kong Ming Trading, the sole proprietorship was succeeded by KMTSB whereby the business of KMT was absorbed by KMTSB. As a private limited company, it is necessary for audited accounts to be maintained. Secondly, the first respondent as a director would be entitled as of right to view and analyse the accounts. Despite this, it is inexplicable why the respondents failed to examine the accounts over the disputed period.

[39] It was submitted that the first appellant was in a fiduciary position with regards to the other partners of the company, and that he had breached his fiduciary duties.

[40] It was argued that the appellants did not adduce any evidence of their allegations that the accounts had been audited or that the respondents were aware that the company funds were utilised for the first appellant's personal use. No accountant was named by the appellants or called to testify that accounts were prepared. Since no accounts were prepared, it could not be ascertained whether the amount misappropriated by the appellants were indeed their share of the company's profits.

[41] The respondents' counsel contended that the first appellant's position that some of the partners, namely he and his brother, were entitled to a greater proportion of the profits as compared to the other partners who were only included in the partnership for tax purposes, was untenable since there was no agreement to that effect. Moreover the first appellant had testified that he did not know how much he had taken from the company funds. The contradictions in the first appellant's testimony show that he was not a credible witness and was evasive in his answers. Given this finding of the trial judge it was submitted that this court should not interfere with this finding of fact.

[42] The respondents' counsel argued that the appellants raised the issue of limitation but failed to plead the specific section of the Limitation Act 1953 that they were relying on. In any case, it was submitted that the respondents only discovered the misappropriation in October 2010 and this fact was not challenged in cross-examination. It was submitted that limitation only started to run from the date the misappropriation was discovered and not from the actual date of 'misappropriation'. Besides that, the appellants should not be allowed to rely on the issue of limitation when they have been guilty of unconscionable conduct.

[43] In all these circumstances, learned counsel for the respondent maintained that this court should affirm the decision of the learned High Court Judge.

Principles Of Appellate Intervention

[44] As stated at the outset, we were cognizant at all times that as an appellate court we should be slow to overturn the decision of the trial judge who had enjoyed the benefit of the audio-visual aspects of the witness's testimony. We had to be convinced that the learned judge was plainly wrong in arriving at his decision in order to justify appellate intervention.

[45] Two aspects arise in this context. In terms of the credibility of witnesses, the appellate court is in an even more difficult position, as the trial judge's conclusions are derived from seeing and hearing the witnesses first hand. However, in situations where the conclusions drawn are untenable in that no reasonable or prudent judge could have arrived at that particular conclusion given the factual matrix of the case, or where there has been a singular failure to consider relevant and significant evidence, *albeit* oral or documentary, or where there has been a failure to evaluate the pertinent evidence, then the appellate court, in a fit case can and will intervene.

[46] The position is somewhat different with regards to points of law where the appellate or reviewing court is in as advantageous a position as the trial court to make a determination on an issue of law. Here, the appellate court is justified in considering matters of law *ab initio* and correcting errors of

construction. (For the principles of appellate intervention see also *Thomas v. Thomas* [1947] AC 484, *Clarke v. Edinburgh and District Tramways Co Ltd* [1919] SC (HL) 35, *Yuill v. Yuill* [1945] P 15, *McGraddie v. McGraddie and another* [2013] UKSC 58, *Anderson v. City of Bessemer* (1985) 470 US 564, *Henderson v. Foxworth Investments Limited* [2014] UKSC 41, *Carlyle v. Royal Bank of Scotland plc* [2015] UKSC 13, *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] 1 LNS 119; [1979] 2 MLJ 229, *Merita Merchant Bank Singapore Ltd v. Dewan Bahasa dan Pustaka* [2014] 9 CLJ 1064, *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309, *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 CLJ 453, *Conlay Construction Sdn Bhd v. Perembun (M) Sdn Bhd* [2013] 9 CLJ 828.)

Our Decision

[47] Bearing these principles in mind, we concluded that this was a fit case for appellate intervention because the learned judge was, in our view, plainly wrong in his conclusion that the respondents had established on a balance of probabilities that the appellants, more particularly the first appellant, had defrauded them of the sum of RM3,073,069.17.

[48] Further, we were also of the view that the trial judge had erred in his construction and interpretation of s. 29 of the Limitation Act 1953, more particularly in concluding that there was fraudulent concealment of the alleged 'fraud' until 2010. This was an error of law that required rectification by this court.

Fraud And s. 29 Of The Limitation Act 1953

[49] On the allegation of fraud, it was apparent from a consideration of the pleadings that no *modus operandi* or particulars of fraud were set out in the statement of claim. This was primarily because the respondents simply relied on the fact of the undisputed withdrawals over the period 1990 – 1999 to establish fraud. No further evidence was adduced to establish fraud. More tellingly, it was not disputed that all the withdrawals were fully recorded by a third party employee. This is not consonant with fraud which generally involves the concealment of the withdrawals. In point of fact, the respondents failed to even establish that the monies set out in the annexure to the statement of claim were 'misappropriated'. In this context the trial judge erred in equating a withdrawal of funds with misappropriation. He failed to consider adequately or at all the defence of the first appellant to the effect that there had been full disclosure of all withdrawals. He also failed to consider the first appellant's testimony that the monies were drawn either by way of profits due to the appellants or for the legitimate purposes of the business of KMT or KMTSB.

[50] The learned judge simply concluded that the first appellant had failed to produce any evidence to support his contention that there had been no fraudulent concealment of the accounts by, for example, calling the requisite auditors etc.

[51] In so doing, the learned judge, with respect, fell into error in that he failed to comprehend that the burden of proof at all times remained on the respondents to establish fraud. Simply pointing to withdrawals and testifying orally that they had no knowledge of the accounts is insufficient to establish fraud. That is particularly so when the surrounding contemporaneous evidence shows that disclosure could have been sought and obtained at any point of time. This is borne out by the fact that every single withdrawal was particularised and set out, which detracts from a scheme to defraud. Secondly, the business of KMT was taken over by the company KMTSB. As a private limited company, KMTSB was bound to have its accounts audited. More importantly the first respondent as a director was entitled as of right to full disclosure in respect of the accounts, if he had seen fit to demand such disclosure. However, this was not done till the year 2010. The learned judge therefore, failed to consider that s. 29 of the Limitation Act 1953 requires the person seeking to fall within its ambit and lengthen the period of limitation to establish that he could not, with reasonable diligence, have discovered this fact. On the factual matrix of our case however, it is evident that the accounts were accessible to the respondents at all material times. The learned judge erred in that he failed to consider adequately or at all this contemporaneous and relevant evidence. If he had done so, he would have concluded that the respondents could have sought and procured access to the accounts of KMTSB or KMT long before 2010. The requirement of 'reasonable diligence', an essential element of s. 29 of the Limitation Act 1953, was therefore not made out.

[52] Further, the fact that the respondents had possession of the accounts pursuant to the oppression petition as of 2010 and yet neither lodged a police report alleging fraud or seeking recovery until some two years later, also suggests that the respondents' claim lacks legitimacy. When it is considered that this is one of three claims arising from what is essentially a family dispute, it is evident that the respondents are seeking to initiate several claims, in instalments. This is not a tenable way of making claims. Litigation in relation to matters involving the business of KMT or KMTSB ought to be litigated in one suit. Filing several suits gives rise to the possibility of duplicity in findings, not to mention *res judicata*. This is yet another aspect of the claim that the learned trial judge failed to consider. On the contrary, the learned trial judge, with respect, undertook an unrealistically simplistic view of the case. He failed to appreciate that a plea of fraud is not simply made out by pointing to the undisputed fact of withdrawals from KMT or KMTSB. It requires considerably more to establish fraud. To exacerbate matters, the appellants' version of events was not adequately considered or evaluated.

[53] As a consequence, we concluded that even applying the lower standard of a balance of probabilities the plea of fraud was simply not made out. Neither did the factual matrix of the case allow the respondents to rely on

s. 29 of the Limitation Act 1953. There was no evidence to support the respondents' contention of fraudulent concealment, given the availability of the accounts to the respondents upon request during the material period. The net result that the claim was substantially time barred.

[54] Finally, the learned judge had erroneously reversed the onus of proof to establish both fraud and fraudulent concealment (within the context of s. 29). The onus to establish a cause of action in fraud, as well as fraudulent concealment within the context of s. 29 of the Limitation Act 1953, fell on the respondents. However, it is evident from a perusal of the grounds of judgment that the learned trial judge, with respect had reversed the burden. This is because he accepted that fraud had been established simply by reason of the undisputed withdrawals from the accounts of KMT or KMTSB. He then placed the burden on the appellants to rebut the allegation of fraud which he assumed had been established fully. The learned trial judge should have considered whether fraud had indeed been made out on simply that basis. He did not consider the *modus operandi* for the fraud or particulars of the same. Most fatally perhaps, he failed to give any or any reasonable consideration to the appellants' defence of full disclosure and acquiescence to those withdrawals. The defence meets and defeats any possibility of fraud.

[55] In all these circumstances we were satisfied that the learned trial judge was plainly wrong in arriving at his conclusion that fraud had been established on the evidence on record.

[56] Similarly, the learned judge erred in his construction and application of s. 29 of the Limitation Act 1953 in concluding that there was fraudulent concealment on the part of the appellants which brought the respondents' claim within the ambit of that section.

[57] We therefore allowed this appeal. The decision of the High Court was set aside. We granted the appellants costs of RM30,000 for the proceedings here and below. The deposit was refunded to the appellants.